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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAY 20 1997

Federal Communications Commission
Office of Secretary

In The Matter of

American Communications Services, Inc.

Petition for Expedited Declaratory Ruling
Preempting Arkansas Public Service
Commission Pursuant to Section 252(e)(5)
of the Communications Act of 1934,
as amended

CC Docket No. 97-100

**REPLY OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION
TO OPPOSITIONS TO THE PETITION OF
AMERICAN COMMUNICATIONS SERVICES, INC.
FOR EXPEDITED DECLARATORY RULING**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, and Public Notice, DA 97-652, released April 3, 1997, hereby submits its Reply to Oppositions to the Petition for Expedited Declaratory Ruling ("Petition") filed by American Communications Services, Inc. ("ACSI") in the above-captioned matter. In its earlier-filed Comments in support of the ACSI Petition, TRA urged the Commission to preempt the Arkansas Telecommunications Regulatory Reform Act of 1997 (the "Arkansas Act") to the extent necessary (i) to free the Arkansas Public Service Commission ("Arkansas PSC") to perform the pro-competitive role envisioned for it by the Telecommunications Act of 1996 (the "1996 Act")¹ in opening local

¹ Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

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exchange/exchange access markets within the State of Arkansas to competition and (ii) to eliminate protectionist provisions designed to insulate incumbent providers from competitive challenges. Oppositions to the ACSI Petition were filed by Aliant Communications Co. ("Aliant"), the Attorney General of the State of Arkansas ("Arkansas Attorney General"), the Arkansas Telephone Association ("ArkTA"), the Northern Arkansas Telephone Company ("NATC"), and Southwestern Bell Telephone Company ("SWBT").

I. 'Standing' And 'Ripeness' Are Not Pertinent Considerations

The Arkansas Attorney General and ArkTA oppose the ACSI Petition on the twin grounds that ACSI purportedly lacks the requisite standing to be entitled to the declaratory ruling it seeks and that the matters raised in the ACSI Petition are purportedly not yet ripe for decision.² These commenters argue that ACSI must have been directly injured by operation of the Arkansas Act before it may petition the Commission for preemptive relief. TRA disagrees.

Section 253(a) of the Communications Act of 1934, as amended by the 1996 Act, stands as an affirmative barrier to "State or local statute[s] or regulation[s], or other State or local legal requirement[s which] may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."³ Section 253(d) requires the Commission to "preempt the enforcement" of any "statute, regulation, or legal requirement that

² Comments of the Arkansas Attorney General at 7 - 13; Comments of ArkTA at 5 - 7.

³ 47 U.S.C. § 253(a).

violates subsection (a)."⁴ The only precondition imposed on such preemptive action by the Commission is that it provide the public with notice and an opportunity for comment prior to so acting.⁵

Accordingly, the Commission need not passively await the filing of a petition seeking preemption in order to take preemptive action. The Commission may issue a declaratory ruling pursuant to Section 253(d) "on motion or on its own motion."⁶ Indeed, the Commission has an affirmative obligation under Section 253(d) to take preemptive action on its own motion if no preemption petitions are forthcoming. Section 253(d) mandates that the Commission "shall" preempt the enforcement of any statute, regulation, or legal requirement that violates Section 253(a). Thus, no issue of standing is present here because it is the violative State or local statute, regulation, or legal requirement that triggers the Commission's preemptive authority.

Ripeness likewise is not a consideration for much the same reason. Because it is the violative State or local statute, regulation, or legal requirement that gives rise to the Commission's obligation to take preemptive action, no showing by a petitioner of "injury in fact" is necessary. Moreover, Section 253(a) makes clear that a State or local statute, regulation, or legal requirement is subject to preemption if it "may" prohibit or have the effect of prohibiting the provision of any interstate or intrastate telecommunications service. Section 253, accordingly, does not require, or for that matter, allow, the Commission to wait for competitive harm to occur;

⁴ 47 U.S.C. § 253(d).

⁵ Id.

⁶ 47 C.F.R. § 1.2.

it anticipates Commission preemptive action upon passage or adoption of a violative State or local statute, regulation, or legal requirement

II. Transparent Qualifiers Cannot Insulate The Arkansas Act From Preemption

Aliant, the Arkansas Attorney General, ArkTA, NATC, and SWBT all rely upon such qualifiers as "[e]xcept to the extent required by the Federal Act" with which the Arkansas Act is laced in arguing that the Arkansas Act is not inconsistent with the pro-competitive Federal policy embodied in Sections 251 and 252 of the 1996 Act.⁷ TRA again disagrees. Simply mouthing the words "[c]onsistent with the Federal Act" cannot render a statute designed to limit competitive intrusions into the local exchange/exchange access market consistent with a statute whose overarching purpose is to "open[] all telecommunications markets to competition."⁸

The Commission has correctly characterized the 1996 Act as "[a] statute designed to develop a *national* policy framework to promote local competition."⁹ The essence of the Arkansas Act is captured in Section 9(d):

. . . the Commission shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications services, to provide interconnection or to sell unbundled network elements to a competing local exchange carrier for the purpose of allowing

⁷ Comments of Aliant at 1 - 3; Comments of the Arkansas Attorney General at 4 - 7, 18 - 20; Comments of ArkTA at 8 - 16; Comments of NATC at 3 - 8; Comments of SWBT at 7 - 13. 47 U.S.C. § § 251, 252.

⁸ Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement").

⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 87 - 88 (released August 8, 1996), *pet. for rev. pending sub nom. Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996), *further recon. pending* (emphasis added) ("Local Competition First Report and Order").

such competing carrier to compete with the incumbent local exchange carrier in the provision of basic local exchange service.

While the above-quoted passage is preceded by the qualifier "[e]xcept to the extent required by the Federal Act," its dictate is clear. The Arkansas PSC is foreclosed by legislative directive from undertaking such acts as may be necessary to open to competitive entry local exchange/exchange access markets, and to promote the competitive provision of local exchange/exchange access services, within the State of Arkansas.

As TRA pointed out in its Comments, "[t]he 1996 Act . . . recast the relationship between the FCC and state commissions responsible for regulating telecommunications services,"¹⁰ providing key roles for both federal and state regulators. The Commission was to "adopt national rules where they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish."¹¹ State commissions were to "take into account local concerns," imposing "additional pro-competitive requirements" where necessary to facilitate the competitive provision of local exchange/exchange access service.¹²

In the State of Arkansas, the State commission cannot fulfill this unequivocal Congressional directive. As TRA demonstrated in its comments, the Arkansas PSC, following

¹⁰ *Id.* at ¶ 2.

¹¹ *Id.* at ¶ 41; *see id.* at ¶¶ 113 - 114.

¹² *Id.* at ¶¶ 53, 66.

enactment of the Arkansas Act, is simply not in a position to "craft a working relationship [with the Commission] that is built on mutual commitment to local service competition . . . or to adopt other critically important rules to promote competition."¹³ As a matter of law, the Arkansas PSC is precluded from expanding the prescribed list of network interconnection points or increasing the number of available unbundled network elements. As a matter of law, the PSC is precluded from imposing on an incumbent LEC any additional resale obligations or require enhanced access to such ancillary services as operator services, directory assistance and listings, as well as the 911 service critically important to public safety. As a matter of law, the Arkansas PSC is precluded from independently establishing cost methodologies following proceedings in which interested parties are allowed to participate. And the list goes on and on.

Chanting the mantra "[c]onsistent with the Federal Act" does not negate either the clear intent or the unavoidable impact of the Arkansas Act. Under orders from the Arkansas General Assembly, the Arkansas PSC will be working to thwart, not to further, the will of Congress, as embodied in the local telephony provisions of the 1996 Act. The Commission has always had the authority to preempt state statutory or regulatory actions which would have the effect of thwarting or impeding federal regulatory goals, provided that such regulatory action was "narrowly tailored to preempt only such state [actions] as would negate valid FCC regulatory goals."¹⁴ Under the new regulatory regime established by the 1996 Act, the Commission would be acting within the scope of its delegated authority under Section 253(d) in preempting State

¹³ *Id.* at ¶ 53.

¹⁴ *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1990) (*quoting* *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)..

actions which are inconsistent with Sections 251 and 252 and the implementing rules promulgated by the Commission thereunder.¹⁵

III. An Absolute Prohibition On Market Entry Is Not Required To Trigger Section 253(d)

The Arkansas Attorney General, NATC and SWBT contend that preemptive action under Section 253(d) can only be justified by an absolute "legal" barrier to entry.¹⁶ According to these commenters, a prospective competitor must have been denied the right to provide a telecommunications service before Section 253(d) is triggered. TRA submits that this restrictive reading of Section 253(d) is inconsistent with Congressional intent.

Competitive restraints can take many forms. Mere market entry will not fulfill the pro-competitive vision of Congress, if competitive survival is thwarted by other more insidious impediments. As confirmed by its legislative history, Section 253 was "intended to remove *all* barriers to entry in the provision of telecommunications services."¹⁷ The Conference Report's reference to "all barriers to entry," particularly when read in conjunction with Section 253's prohibition of any State or local statute, regulation or legal requirement that "may . . . have the effect of prohibiting" competitive provision of service, confirms that Section 253 bars not just legal, but economic, technical and other operational, barriers to service provision. As the Commission has recognized:

¹⁵ Louisiana Pub. Serv. Comm'n. v. FCC, 476 U.S. 355, 369 (1986); New England Public Communications Council Petition for Preemption Pursuant to Section 253, CCBPol 96-11, FCC 96-470, ¶ 26 (December 10, 1996), *recon.* FCC 97-143 (April 18, 1997).

¹⁶ Comments of the Arkansas Attorney General at 18 - 20; Comments of NATC at 9 - 10; Comments of SWBT at 13 - 14.

¹⁷ Joint Explanatory Statement at 126 (emphasis added).

Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. . . . The elimination of ['operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled network elements to new entrants'] is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets.¹⁸

Preemptive action by the Commission is unquestionably called for to eliminate absolute legal barriers to market entry. It is no less appropriate when a State or local statute, regulation, or legal requirement skews the rules of engagement in favor of incumbent providers to such an extent that local exchange/exchange access competition is no longer a practical possibility for some or all prospective competitors. Thus, the Commission in New England Public Communications Council Petition for Preemption Pursuant to Section 253 preempted a regulation that "single[d] out independent (i.e., non-LEC) payphone providers and bar[red] them from the payphone market unless they [became] certified LECs" because it "significantly affect[ed], if not completely eliminate[d], the ability of independent payphone providers to compete for customers."¹⁹ As the Commission explained:

We find that requiring payphone providers to provide local exchange services in order to be eligible to offer payphone services significantly hinders such providers relative to incumbent LECs and certified LECs. Such a requirement substantially raises the costs and other burdens of providing payphone services, thus deterring the entry of potential competitors.²⁰

¹⁸ Local Competition First Report and Order, FCC 96-325 at ¶¶ 16, 18.

¹⁹ New England Public Communications Council Petition for Preemption Pursuant to Section 253, FCC 96-470 at ¶ 20.

²⁰ Id.

IV. CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to fulfill its obligations pursuant to Section 253 of the 1996 Act by preempting the Arkansas Telecommunications Regulatory Reform Act of 1997 to the extent necessary (i) to free the Arkansas Public Service Commission to perform the pro-competitive role envisioned for it by the Telecommunications Act of 1996 in opening local exchange/exchange access markets within the State of Arkansas to competition and (ii) to eliminate protectionist provisions designed to insulate incumbent providers from competitive challenges.

Respectfully submitted,

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

By: _____



Charles C. Hunter

Catherine M. Hannan

HUNTER COMMUNICATIONS LAW GROUP

1620 I Street, N.W.

Suite 701

Washington, D.C. 20006

(202) 293-2500

May 20, 1997

Its Attorneys

CERTIFICATE OF SERVICE

I, Jeannine Greene Massey, hereby certify that copies of the foregoing document were mailed this 20th day of May, 1997, by United States First Class mail, postage prepaid, to the following:

Riley M. Murphy
Charles H.N. Kellenbach
American Communications Services, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Brad E. Mutschelknaus
Danny E. Adams
Marieann Z. Machida
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Emily M. Williams
Association for Local
Telecommunications Services
1200 19th Street, N.W.
Washington, D.C. 20036

Roy E. Hoffiinger
AT&T Corp.
295 N. Maple Avenue
Room 3249J1
Basking Ridge, NJ 07920

Leon M. Kestenbaum
Sprint Communications Company
1850 M Street, N.W., Suite 1110
Washington, D.C. 20036

Amy G. Zirkle
MCI
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Robert A. Mazer
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-1008

Winston Bryant, Attorney General
Vada Berger
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, Arkansas 72201

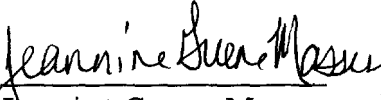
George Hopkins
Arkansas Telephone Association
P.O. Box 913
Malvern, Arkansas 72104

Gerard J. Duffy
Blooston, Mordkofsky, Jackson &
Dickens
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037

Michael K. Kellogg
Kellogg, Huber, Hansen, Todd &
Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

Ms. Janice Myles*
Federal Communications Commission
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

International Transcription Services, Inc.*
1231 20th Street, N.W.
Washington, D.C. 20036


Jeannine Greene Massey

* By Hand Delivery